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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-844

ROSEMARY FURMAN, d/b/a
NORTHSIDE SECRETARIAL SERVICE

Appellant,

v.

THE FLORIDA BAR,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS AND AFFIRM

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Pursuant to Rule 16 of the Supreme Court Rules, the appellee respectfully moves this Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Florida Supreme Court below. Should this Court construe this appeal as a petition for certiorari, the appellee moves the Court to deny such petition.

STATEMENT OF THE CASE

A. Facts

Appellee disputes portions of the appellant's statement of the case in the Jurisdictional Statement (hereinafter referred to as Jur. St.) as follows.

Appellant correctly asserts that Florida is a "no-fault" divorce state and also that Florida law specifically permits any individual to represent himself in legal actions including a dissolution of marriage proceeding. Appellant then states, (Jur. St., page 4) "Despite this apparent simplicity, it is an undisputed fact that most people are unable to obtain a divorce in Florida without assistance." Appellant does not cite the record to establish this fact and appellee questions it. The Florida Supreme Court permits laypersons to sell printed dissolution of marriage forms and written explanations of legal procedures. The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1194 (Fla. 1978). This Court may wish to take judicial notice of the fact that major Florida newspapers routinely carry advertisements by form or "kit" sellers - leading to the conclusion that many people do in fact represent themselves in obtaining a dissolution of marriage.

The appellant next attempts to pursuade the Court that there exists a class of persons in Jacksonville, Florida, where appellant works, who are too affluent to qualify for legal aid, yet still indigent (apparently measured by appellant's financial yardstick). Appellant would have this Court permit her to allow this alleged class of persons who are "too well off, yet not well off enough" to rely on her for legal advice. However, her advice is not gratuitous, but is for a fee. Appellant admits (Jur. St., page 5) that "What she has done has been to take the information that her clients have given her and type the necessary documents." It seems impossible to characterize appellant's service as anything other than one of determining what legal remedy her customer seeks and then preparing the legal instruments which she believes appropriate to effect the desired relief. For that service, appellant regularly charges $50.

Appellant next accurately asserts that attorneys' fees for divorces in Florida have declined since this Court's ruling in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). However, appellant alleges, without any apparent foundation, that Florida attorneys' fees are, "still far in excess of what most of appellant's clients can afford." Appellee disputes this contention.

The full effect of attorney advertising has yet to be felt in Florida and attorneys' fees for dissolutions may decline to a level lower than that charged by appellant. In addition, if customers can "afford" to pay the appellant's fee, are they be unable to "afford" to pay a licensed attorney $60 or even $100?

B. Proceeding Below

The appellant correctly states (Jur. St., page 6) that the Florida Supreme Court's decision in Brumbaugh changed the rules of unauthorized practice of law relative to lay assistance in dissolution proceedings. The appellant added that "the Court specifically authorized persons such as appellant and Ms. Brumbaugh to type legal papers tailored to the client's circumstances." Appellee contends that this statement is erroneous since the decision permitted Ms. Brumbaugh to "engage in a secretarial service, typing such forms for her clients, provided that she only copy the information given to her in writing by her clients." (emphasis added) Brumbaugh at 1194.

It would appear that the aim of the Florida Supreme Court is to allow laypersons to assist

customers to prepare their own papers, but not to allow the customers to rely on the laypersons for legal advice in the preparation of the papers.

The appellant next states that the referee heard testimony after the parties stipulated to many facts, "including that no client of appellant had ever suffered any harm from her services." (Jur. St. page 7 and 8). On the contrary, the appellee stipulated that, "the parties agreed that the customers did not think or know that they had suffered any damage as a result of Respondent's services. . . ." (emphasis added) (Jur. St. page 28a).

THIS APPEAL SHOULD BE DISMISSED BECAUSE IT DOES NOT STATE A SUBSTANTIAL FEDERAL QUESTION.

Appellee contends that the question presented by the appellant is fundamentally deficient by its own terms. The appellant asks whether Florida may apply its unauthorized practice of law rules to require indigents seeking adoption or divorce, and who are unable to prepare the necessary legal documents themselves, to employ a licensed

attorney charging fees they can't afford, rather than appellant whose fees they can afford.

The question assumes, although the facts in the record don't necessarily show, that there is a class of persons in Jacksonville, Florida, who: (1) lack the ability to represent themselves in seeking a dissolution; (2) are too affluent to qualify for free legal aid; (3) are too poverty sticken to afford a licensed attorney (who, appellant admits, have lowered their fees since the referee hearing in July, 1978); and (4) are nevertheless affluent enough to afford appellant. In addition, appellant assumes that the fees charged by both appellant and Jacksonville attorneys are static rather than dynamic (since if either appellant's fees go up or attorneys' fees go down the financial advantage to the class appellant allegedly seeks to protect is lost).

Appellant generally rests her argument on two different chains of decisions which protect the rights of indigents - one started by Boddie v. Connecticut, 401 U.S. 371 (1971) and the other by Johnson v. Avery, 393 U.S. 483 (1969). Both of these cases and their prodigy protect the rights of indigents to access to the courts, but neither is particularly relevent to the facts presented by this case.

The appellant cites Boddie for the proposition that the state may not deny a person the fundamental right to obtain a divorce on economic grounds where the state controls the exercise of that right by charging a filing fee (Jur. St. at 10). To apply Boddie to these facts would require a major extension of that rule. Obviously, Florida does not compel anyone to employ an attorney in dissolution proceedings. As appellant pointed out (Jur. St., page 10) this Court has declined to extend the Boddie doctrine into other areas. United States v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973). Even the language of this Court's holding in Boddie was carefully worded to limit the decision to the case before the Court when the "bona fides of . . . appellant's indigency . . . [is] beyond dispute." Boddie at 382.

Appellant cites several cases in which Boddie was applied in a manner which supports appellant's position. It should be noted, however, that one of these cases, Moeck v. Zajackowski, 305 F. Supp. 463 (W.D. Wis. 1974), was reversed on appeal, Matter of Warden of Wisconsin State Prison, 541 F. 2d (1976) thus further limiting judicial expansion of this theory.

The Johnson decision, cited by appellant, stands for the proposition that persons physically imprisoned may not be denied certain types of legal assistance. That situation is entirely different from the facts of this case.

This Court has repeatedly recognized that indigents charged with crimes are to be afforded a greater amount of legal assistance than are indigents in civil cases. Gideon v. Wainwright, 372 U.S. 335 (1963); Agersinger v. Hamlin, 407 U.S. 25 (1972). Johnson would seem to be a logical extension of these extra protections afforded in criminal situations. But even in Johnson, the state was permitted to, "impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance . . . for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities." Johnson at 490.

The instant case does not concern criminal indigents who are physically restrained from access to courts or even from access to legal aid. Again, appellant does not seek to provide these indigents with qualified legal aid, rather she offers only her own services.

Appellee would emphasize to the Court that appellant cites the Airey case, decided by the European Court of Human Rights as, "perhaps the most instructive decision." (Jur. St., page 13) Such a construction is intriguing since the European Court suggested that Ireland provide Mrs. Airey with a lawyer, not a layperson, to assist her. It should also be noted that Mrs. Airey could only obtain relief from the Irish High Court, not the lower courts as contrasted with the situation in Florida. In addition, no free legal aid was available to her. Indeed, appellee submits that if Irish divorces were granted under the same procedures and circumstances as are dissolutions in Jacksonville, Florida, Mrs. Airey would have clearly lost her case. See Airey case, pages 11-12.

THE COURT SHOULD AFFIRM THE FLORIDA SUPREME COURT BECAUSE THE OPINION BELOW IS CORRECT

It is clear that the injunction handed down from the Florida Supreme Court which binds the appellant in this case rests on the Florida court's prior decision in Brumbaugh. There, the court explained the rationale it used in approaching a case such as this one, as follows:

But in cases such as this, the Florida Supreme Court is not confined to act solely in its judicial capacity. In addition, it acts in its administrative capacity as chief policy-maker, regulating the administration of the court system and supervising all persons who are engaged in rendering legal advice to members of the general public. Such authority carries with it the responsibility to perform this task in a way responsive to the needs and desires of our citizens. This principle has long been our goal. In State v. Sperry, 140 So.2d 587, 595 (Fla. 1962), we noted:

> The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the

> public interest, lawyers are bound to observe.
>
> The Florida Bar as an agent of this Court, plays a large role in the enforcement of Court policies and rules and has been active in regulating and disciplining unethical conduct by its members. Because of the natural tendency of all professions to act in their own self interest, however, this Court must closely scrutinize all regulations tending to limit competition in the delivery of legal services to the public, and determine whether or not such regulations are truly in the public interest.

The Florida court then went on to discuss such constitutional rights as commercial free speech, access to the courts, the right to pursue a lawful occupation or business, and the right of self representation. (Brumbaugh 1190, 1192-1193.) Ultimately, the court exercised its power to regulate the practice of law in Florida by fashioning an injunction, which in its view, placed the minimum weight of restrictions on the constitutional rights at issue while simultaneously protecting Florida citizens from potentially harmful reliance on unauthorized legal practitioners.

This Court's decision in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) approved the concept of minimum state regulation designed to prevent future harm to the public in the area of solicitation of business by attorneys by stating:

> The rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs.
>
> . . .
>
> The efficacy of the State's effort to prevent such harm to prospective clients would be substantially diminished if, having proved a solicitation in circumstances like those of this case, the State were required in addition to prove actual injury.
>
> . . .
>
> If appellant's view were sustained, in-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession[28] in contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner. It therefore is not unreasonable or violative of the Constitution for a State to respond with what in effect is a prophylactic rule.[29]

The appellee submits that the injunction below rests on the same type of rule previously approved by this court in Ohralik.

THE COURT SHOULD AFFIRM THE FLORIDA SUPREME COURT BECAUSE THE UNIQUE FACTS PRESENTED HEREIN DO NOT PROVIDE AN APPROPRIATE VEHICLE FOR AN EXAMINATION OF BROAD CONSTITUTIONAL PRINCIPLES.

If this Court should grant the relief sought by the appellant it would, in effect, be deciding what conduct amounts to the practice of law in Florida. If appellant is permitted to allow the public to rely on her for services which can hardly be characterized as anything but legal services, the scope of activity defined as the practice of law in Florida must necessarily contract.

Historically, this Court has left such definition and regulation to the state judiciary. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) this Court said,

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions . . . .
>
> The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." (at 792)

Also, as recently as January, 1979, this Court rejected a constitutional challenge to the authority of Ohio courts to regulate admission of out-of-state attorneys to practice in particular cases. In Leis v. Flynt, ____ U.S. ____ (1979), 99 S.Ct. 698 (1979) this Court said,

> We do not question that the practice of courts in most States is to allow an out-of-state lawyer the privilege of appearing upon motion, especially when he is associated with a member of the local bar.

. . .

> But it is not a right granted either by statute or the Constitution. Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct.

If Florida were required to permit the appellant to practice law, what rational basis could be used to prohibit other unlicensed and untrained persons from delivering, or attempting to deliver, the same services offered by the appellant? Surely this is a clear risk of harm to the public which is foreseeable and which may be constitutionally prohibited by the highest court of a state.

Finally, the appellant (Jur. St., page 15) advised this Court that the Florida Supreme Court directed the appellee to complete a study of better ways to provide legal services to indigents. Appellant stated that the study had barely begun. On the contrary, appellee has responsibly approached the task of completing the

study, and has very nearly finished it. A request has been lodged with the Florida Supreme Court to permit filing of the report not later than February 1, 1980.

CONCLUSION

For the foregoing reasons, this Court should either dismiss this appeal or affirm the opinion of the Florida Supreme Court.

Respectfully submitted,

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Printing Correction

The appellee would respectfully draw the Court's attention to the omission of the page number from the citation of Matter of Warden of Wisconsin State Prison on pages (ii) and 7 which should read Matter of Warden of Wisconsin State Prison, 541 F. 2d 177 (1976). A copy of this document has been enclosed in each copy of appellee's Motion to Dismiss and Affirm.

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